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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

ALVA FISHER,

Petitioner,

v.

STATE OF MONTANA, EX REL, IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, A MINOR BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

CLARENCE T. BELUE
201 West 4th Street
Hardin, Montana 59034
Attorney for Petitioner

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CLARENCE T. BELUK
ATTORNEY AT LAW
301 WEST FOURTH ST.
HARDIN, MT. 59034

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STATE OF MONTANA, EX REL IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, A MINOR BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The petitioner, Alva Fisher, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Montana rendered in these proceedings on June 2, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported as STATE of Montana ex rel. In the Matter of the ADOPTION OF Ivan FIRECROW, a minor by Leroy Runsabove and Josephine Runsabove, Petitioners, v. The DISTRICT COURT OF the SIXTEENTH JUDICIAL DISTRICT of the State of Montana, IN AND FOR the COUNTY OF ROSEBUD, and the Honorable Alfred B. Coate, Judge Thereof, Respondents, No. 13025. 536 P.2d 190. The full text of this opinion appears at Appendix A, infra, p. 17A. The opinion of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud is unreported, and appears at Appendix B, infra, p. 21. The

CLARENCE T. BELUK
ATTORNEY AT LAW
301 WEST FOURTH ST.
HARDIN, MT. 59034

Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians is unreported, and appears at Appendix C, infra, p. 25.

JURISDICTION

The order or judgment of the Supreme Court of the State of Montana was entered on June 2, 1975. See Appendix A, p. 17A, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS RAISED

Leroy and Josephine Runsabove, petitioned the Sixteenth District Judical Court of the State of Montana for adoption of Ivan Firecrow, a minor and the son of your petitioner, Alva Fisher. The child was at the time a ward of the Northern Cheyenne Tribal Court, and your petitioner had temporary custody rights pursuant to order of the Tribal Court. All parties are enrolled Indians and all reside within the reservation.

The question thereby arising is:

Whether the Montana District Court has jurisdiction over an adoption petition where the would be adoptive parents, the child, and the natural parents are enrolled members of the Northern Cheyenne Tribe and reside on the reservation, and where the child is a ward of the Tribal Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDIANCES, REGULATIONS INVOLVED

Constitution of the United States, Article I, §8, cl 3:

> "The congress shall have power—. . .[t]o regulate commerse . . . with the Indian tribes."

Constitution of the United States, Article II, §2, cl 2:

> "[The president] shall power, by and with the consent of the senate to make all treaties. . ."

25 U.S.C. § 372 (a):

> "In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be

CLARENCE T. BELUE
ATTORNEY AT LAW
301 WEST FOURTH ST.
HARDIN, MT. 59034

> recognized as an heir of a deceased Indian by virtue of an adoption—"
>
> "(1) Unless such adoption shall have been—"
>
> "(a) by a judgment or decree of a State court;"
>
> "(b) by a judgment or decree of an Indian court;"
>
> "(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or"
>
> "(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or"
>
> "(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behlaf of a minor child approves of the recordation..."

25 U.S. C. § 1322 (a):

> "The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the State."

Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Article IV, Section 1, cl. i, k, l, m, p, q:

> "Enumerated Powers - The Tribal Council of the Northern Cheyenne shall exercise the following powers, subject to any limitations imposed by the applicable statutes of United States and subject further to all express restrictions upon such powers contained in this Constitution and the attached Bylaws:"
>
> "(i) To promulgate and enforce ordinances, which shall

CLARENCE T. BELUE
ATTORNEY AT LAW
301 WEST FOURTH ST.
HARDIN, MT. 59034

be subject to review by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

"(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the Tribe shall be subject to review by the Secreatry of the Interior."

"(l) To cultivate and preserve native arts, crafts, culture, and Indian ceremonials."

"(m) To administer charity and to protect the health and general welfare of the Tribe."

"(p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe."

"(q) To provide for the appointment of guardians for minors and mental incompetents by ordiance or resolution subject to review by the Secretary of the Interior."

Article III, Section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation:

"The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe."

"Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized."

"On all adoptions involving nonmembers of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

Article IV, Section 4, cl 3, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation:

"Jurisdiction: The Tribal Court of the Northern Cheyenne Tribe shall have jurisdiction of all cases coming within the terms and provisions of this Act and shall act as a Juvenile Court in the performance of the provisions of this ordinance. The Juvenile Court shall have exclusive original jurisdiction in the following proceedings:"

"(a) Concerning any child who is delinquent."

CLARENCE T. DELUK
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARLEM, MT. 59526

"(b) Concerning parents who willfully and knowingly fail to provide their children with proper food, clothing, medical attention and opportunity to attend school."

"When jurisdiction shall have been obtained by the court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes twenty-one (21) years of age, unless discharged prior thereto or is confined in a state custodial or correctional institution. In trials under this ordinance the child, parent or guardian, or other persons having the care, custody, or control of such child complained against, or any other persons interested in such child, shall have the right to demand a trial by jury, which shall be granted as in other cases unless waived, or the Judge may, on his own motion, call a jury to try a case."

"The jurisdiction of the court shall extend to the child who is otherwise within the jurisdiction of the court, independent of the residence or settlement of the child's parent or guardian, provided, therefore, that the authority of the court to command the presence of the parent or otherwise proceed against the parent does not extend to the parent who is not Indian, or to the parent who is Indian but not within the exterior boundaries of the reservation, or who is otherwise not within the jurisdiction of the court as provided in Chapter 1, Section 2, of the Law and Order Code."

"The jurisdiction of the court does extend to the child whose offense or condition is such as to make him subject to the court under the provisions of this ordinance even though he may have incidentally or subsequently fled the reservation, to the extent that the court may issue a warrant and authorize the taking into cutody and the return of the child by proper authorities to the jurisdiction of the court."

STATEMENT OF FACTS

The facts relevant to the question presented by the petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

On August 20, 1974, petitioners, below, Leroy and Josephine Runsabove filed in the Montana District Court a petition for the adoption of Ivan Firecrow, a minor child, born May 10, 1965. Consent to the adoption and waiver of further notice, executed by the natural father, was filed with the petition for adoption. Petitioners, the child, and the petitioner herein are all enrolled members of the Northern Cheyenne Tribe and have resided on the Northern Cheyenne Reservation at all times pertinent to this matter.

CLARENCE T. DELUK
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARLEM, MT. 59526

On July 1, 1969, Ivan Firecrow was made a ward of the Northern Cheyenne Tribal Court upon a finding that the natural mother had neglected the child. An order was entered that day giving petitioner, below, temporary custody of the child. They have had custody of the child since that time. On August 30, 1974, the Tribal Court ordered the natural mother be granted temporary custody of the child for six weeks during the summer months of 1975.

Article IV, Section 4, cl. 3, of the Revised Law and Ordinances of the Northern Cheyenne Tribe provides for continuing jurisdiction of a child made a ward of the Court as follows:

> "When jurisdiction shall have been obtained by this court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes twenty-one (21) years of age..."

Montana has not assumed civil or criminal jurisdiction within the Northern Cheyenne Reservation pursuant to a Public Law 280, (Act of August 15, 1953, 67 Stat. 588) or the Federal Indian Civil Rights Act of 1968, (Act of April 11, 1968, 82 Stat. 77, 79, 20 U.S.C. § 1321-1326). See Blackwolf et. al. vs. District Court 158 Mont. 523, 526, 493 P.2d 1293 (1972).

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. § 461 et. seq. It is organized and existing under a constitution and by laws ratified by the tribe on November 2, 1935, and approved by the Secretary of Interior in November 23, 1935.

The Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Article IV, Section I, cl. k, l, m, p, and q grant power:

> "(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the Tribe shall be subject to review by the Secretary of the Interior."
>
> "(l) To cultivate and preserve native arts, crafts, culture and Indian ceremonials."

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

> "(m) To administer charity and to protect the health and general welfare of the Tribe."
>
> "(p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe."
>
> "(q) To provide for the appointment of guardians for minors and mental incompetents by ordiance or resolution subject to review by the Secretary of the Interior."

The District Court held a hearing upon the petition for adoption on October 11, 1974. The petitioner objected to the hearing alleging the District Court had no jurisdiction to hear and grant the petition for adoption and, that the matter was within the exclusive jurisdiction of the Tribal Court. Following submission of briefs on the issue of jurisdiction and receipt of an advisory opinion from the Appellate Court of the Northern Cheyenne Tribe, holding that tribal jurisdiction under the facts is exclusive, see Appendix C, infra, p. 25, the District Court issued its order holding that it had no jurisdiction over the adoption and ordered the case dismissed.

The petitioners, below, sought a writ of supervisory control before the Supreme Court of the State of Montana, which revised and remanded holding that

1. The District Court had always had jurisdiction over adoptions involving Indians.

2. Assuming the Northern Cheyenne Tribal Court has jurisdiction over adoptions among its tribal members, such jurisdiction is concurrent with state court jurisdiction.

Petitioner seeks review of the state decision by writ of certiorari.

REASONS FOR GRANTING WRIT

1. The decision below directly conflicts with this Court's rulings in the Williams case, holding that absent Acts of Congress, state courts cannot exercise jurisdiction which would infringe upon the right of Indians to make their own laws and be governed

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

by them.

In Williams v. Lee, 358 U.S. 217, this Court forbade exercise of state jurisdiction where it would undermine the authority of tribal courts over reservation affairs and hense would infringe upon the right of the Indians to govern themselves. That action involved a non-Indian trader, who sued an Indian in the Arizona State Court to collect for goods sold him on credit. This Court reviewed the course of United States policy toward the Indians and affirmed the test that, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be governed by them." 358 U.S. at p. 220. This Court forbade exercise of Arizona state jurisdiction over the suit because "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hense would infringe upon the right of the Indians to govern themselves." Williams, 358 U.S. at 223.

The action of the Supreme Court of the State of Montana cannot be squared with the Williams test.

State jurisdiction does not exist pursuant to Act of Congress. The only statutes whereby this could have been accomplished are Public Law 280 (Act of August 15, 1963, 67 Stat. 588) and the Federal Indian Civil Rights Act of 1968 (Act of April 11, 1968, 82 Stat. 77, 79, 25 U.S.C. § 1321-1326). Montana and the Northern Cheyenne Tribe have never complied with the provisions of either act. See Blackwolf et. al. vs. District Court, 158 Mont. 523, 526, 493 P.2d 1293 (1972).

The Montana Supreme Court opinion states that 25 U.S.C. § 372a implies Congressional conferral of state jurisdiction over adoption matters. This provision is part of the Congressional statutes for decent and distribution and determination of heirship of Alloted Indians. Section 372a was fashioned to avoid the

CLARENCE T. BELLUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

confusion which arises in these matters when adoptions by the "Indian way" are the basis for claimed heirship. All Congress intended by the statue was to establish an orderly means of determining heirship, i.e. by only recognizing adoptions consummated by judicial or quasi-judicial means. The reference to "State court" adoption was in no way a Congressional statement recognizing concurrent jurisdiction. It in no way whatsoever is concerned with jurisdictional matters.

On the contrary, Congress has indirectly established exclusive tribal court jurisdiction over this adoption matter.

The Northern Cheyenne Tribe is incorporated pursuant to Act of Congress under the Wheeler-Howard Act, 25 U.S.C., § 461 et. seq. Among other powers granted to the tribe by Congress is the power:

> "(i) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."
>
> "(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Tribe shall be subject to review by the Secretary of the Interior."
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> "(l) To cultivate and preserve native arts, crafts, culture, and Indian ceremonials."
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> "(m) To administer charity and to protect the health and general welfare of the Tribe."
>
> "(p) To regulate the domestice relations of members of the Tribe and of nonmembers married into the Tribe."
>
> "(q) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution subject to review by the Secretary of the Interior."

Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Article IV, Section I, cl. i, k, l, m, p and q.

CLARENCE T. BELLUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

Pursuant to these tribal powers the tribe inacted Section 2, Article III, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation which provides:

> "The tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe."
>
> "Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized."
>
> "On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, The Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

It is respectively submitted that this ordinance provides for exclusive tribal court jurisdiction over adoption matters where the petitioner, the child and the natural parents are enrolled members of the tribe and reside within the reservation. The Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians so holds. See Appendix C, herein, infra, p. 25.

In the present case all the parties are enrolled members of the Northern Cheyenne Tribe residing within the reservation.

The prerequisites for exclusive tribal jurisdiction as laid down in Williams are fulfilled.

Only two facts distinguish this case from Williams. First, Williams is a debt action; this case involves an adoption; Second, Williams involved a non-Indian trader; all parties here are reservation Indians.

The difference in types of actions is without significance. Although maybe not strictly an adversary proceeding as a debt action (the natural parents are not defendants) they stand in that position and defended against the adoption as such in the

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

courts below. Furthermore, their natural parental rights are afforded due process protection. See Stanley vs. Illionis, 905 U.S. 645, 31 L.Ed 2d 551, 92 S.ct. 1208. Therefore, as the petitioner, Alva Fisher, is a reservation Indian, her parental rights ought to be litigated in tribal court according to tribal law, procedure and customs.

As to the second factual difference, the fact that all parties to this matter are reservation Indians is the very basis for exclusive tribal juridiction under the Tribal Code. See Article III, § 2, Revised Law and Order Ordinances, supra, p. 4. See also Advisory Opinion, Appellate Court, Northern Cheyenne Tribe, Appendix C, infra, p. 25. This Court in Williams found that "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at p. 223. The Montana Court seems to interpret Williams as holding that, although non-Indians can not subject reservation Indians to the state courts, Indians can. But the Congressional policy is not a limitation on non-Indians on the reservation but protection of "the right of reservation Indians to make their own laws and be governed by them." It then follows, that Congress intended that this right also prevent an Indian from subjecting another reservation Indian to a state court. The present case is completely an Indian matter; it involves solely reservation Indians, and subject matter of utmost interest to the Tribe—its children. This fact should not allow state jurisdiction; on the contrary, it cries out even stronger for protection of the authority of the Tribal Court. It is hard to imagine a set of facts which more completely compel the conclusion that, "to allow the exercise of state jurisdicition here would undermine the authority of the tribal courts over reservation affairs and hense would infringe on the right of the Indians to govern themselves." 358 U.S. at p. 223.

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

2. The decision below directly conflicts with this Court's statement in the Williams case limiting state jurisdiction where rights of Indians would be jeopardized.

In the Williams case this Court, in reviewing Indian cases handed down since Worcester, stated that state jurisdiction would be allowed where rights of Indians are not jeopardized. 358 U.S. at p. 219. It would appear that state jurisdiction is not allowed where these rights are jeopardized. Here, according to the Tribal Ordinances on adoptions, the petitioner is granted the right to be heard in this matter before her own tribal court. The State Court decision would deprive her of this right.

Furthermore, what will be the affect upon the petitioner's temporary custody rights granted by the Tribal Court August 30, 1974, if the State Court takes jurisdicition and grants an adoption? Can the Tribal Court effectively enforce custody rights in the fact of an adoption granted by the State of Montana? These questions can only be resolved by review of the Montana decision in light of these questions.

Similar reasoning applies to the child, Ivan Firecrow, who as a reservation Indian is also entitled to similar protection.

3. The decision below effectively destroys tribal jurisdiction over a child made a ward of the Tribal Court as a dependent and neglected child.

The argument for exclusive tribal jurisdiction is even stronger when it is noted that the child was a ward of the Tribal Court long before the Runsabove couple petitioned the State Court for adoption. The child was declared neglected July 1, 1969, and was under the power of the Tribal Court from then until August 30, 1974, when the couple filed their petition with the State Court. A state court decree of adoption would in effect terminate the Tribal Court guardianship powers over the child as well as its

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

powers to hear the adoption matter.

The fact that the child was a ward of the Tribal Court raises another important question when viewed with the ruling below that the Tribal Court's jurisdiction is only concurrent. Once a court of concurrent juridiction has begun to exercise its jurisdiction over a case, its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction may interfere with the proceedings thus pending. Rio Grande R. Co. v. Gomila. 132 U.S. 478, 33 LEd. 400, 10 S.ct. 155. How can the Tribal Court fully exercise its powers as guardian of Ivan Firecrow in the pending dependant child proceedings, if the State Court at the same time may take jurisdiction of an adoption petition. It could possibly be argued that the adoption matter would not necessarily affect custody or guardianship, but it would serve no good purpose for the Runsabove couple to adopt the child in the State Court and then fail to obtain custody by order of the Tribal Court. Such a resolution of this jurisdiction problem would not only lead to endless confusion but would make the child a jurisdictional "football" and thus adversely affect his welfare.

4. The ruling of the Court below finding concurrent jurisdiction over Indian adoptions, appears to be without a precedent among the decisions of this Court.

The petitioner can find no case among the past decisions of this Court allowing concurrent jurisdiction over Indian matters. It appears that to do so would abrogate the principle often stated by this Court that Indians have been a "weak and defenseless people who are the wards of the nation, dependent upon it for protection and good faith." McClanahan v. State Tax Commission of Arizona, 411 W.S. 164, 36, L.Ed.2d, 93 S.ct. 1257, 1263.

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

5. The cases cited by the Court below as authority for finding that state jurisdiction exists are not proper authority for the proposition.

The Montana Supreme Court found state jurisdiction by citing its own decisions so holding. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 31 St. Rep. 22. Petitioner's review of these opinions fails to reveal that such decisions so hold. The subject matter in both cases is divorce; no dicta nor citations refer to adoption matters. The petitioner respectfully questions whether there is a Montana precedent for state court jurisdiction under the facts here presented.

6. The decision below, fails to follow other decisions of the Montana Supreme Court interpreting the Williams Rule.

In the case of Kennerly v. District Court, 400 U.S.C. 423, 27 L.Ed. 2d 509, 91 S.ct. 480, this court reversed the Montana Supreme Court holding that a unilateral conferral of jurisdiction by an Indian tribe to the State Courts was consistant with the exercise of tribal powers of self-government, and therefore, state jurisdiction was reconciled with the rule laid down in the Williams case. 400 U.S. at p. 426.

Subsequent to that reversal, the Montana Supreme Court again interpreted the Williams rule. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, Cert. den., 419 U.S. 847.

In both these cases the Montana Court laid down the rule that:

> "Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction."
>
> 512 P.2d at p. 1299.

CLARENCE T. BULLE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

See also 517 P.2d at p. 896. The petitioner herein contended below that under these interpretations of Williams, and in consideration of the facts of the present case, the State Court lacked subject matter jurisdiction. In both Iron Bear and Bad Horse the Montana Supreme Court based its rulings upholding state jurisdiction over reservation divorce matters upon tribal ordinances indicating tribal intent to refrain from exercising tribal jurisdictions over divorce actions. Thus, under its criteria (2) and (3) the Montana Supreme Court found that state jurisdiction over divorce did not interfere with reservation self-government, and that the Tribal Court was not currently exercising jurisdiction, nor had it exercised jurisdiction in such a way as to preempt state jurisdiction.

In the present case consideration of criteria (2) and (3) would call for a completely different result. The Northern Cheyenne Tribe (not like the divorce ordinances examined in Iron Bear and Bad Horse) has an ordinance calling for exclusive jurisdiction over adoptions where the petitioner, child and parents are enrolled members residing on the Reservation. See Article III, Section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation. See also Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians, Appendix C. infra, p. 25. Here state court jurisdiction would interefere with reservation self government, and even more importantly, the Tribal Court is exercising jurisdiction over reservation adoptions so as to preempt state jurisdiction. It is confusing that the Montana Supreme Court, in the present case ignored its own prior method for anaylsis. Instead it speaks in terms of historically exercising jurisdiction over

CLARENCE T. BULLE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

adoptions, concurrent jurisdiction and of its concern that the would be adoptive parents be afforded equal access to Montana courts. Why doesn't the Williams Rule apply to the present case? Apparently the Montana Court balanced equal protection rights against Indian rights. If this is proper, what is the test for so balancing? It seems that if Williams is to be ignored, this Court ought to define the conditions under which this is proper, and formulate the test for balancing the Indian rights under Williams with Constitutional rights.

7. The impact of the decision below on tribal self-government is enormous.

In effect, the ruling below will allow any reservation Indian who cannot gain an adoption according to tribal laws, procedure, or customs, to petition the State Court for the adoption and thus effectively skirt tribal jurisdiction.

In addition, if such a practice were to be allowed, the tribal interest in the welfare of reservation Indian children could not be protected according to tribal laws, procedure and customs, because state courts would assume a number of these cases.

Also, as shown above, children made wards of the Tribal Court could, by state court adoptions, be in fact, released from tribal guardianship without the permission of the Tribal Court.

Finally, although it does not appear in the facts of this case, it is a fact that a custom exists within the Northern Cheyenne Tribe and other tribes whereby a family or clan often sits in council and decides to allow the adoption of one child of one couple to another couple, who for medical or other reasons are childless. The Tribal Court is in a better position to give deference to this and other tribal customs when entertaining an adoption petition than the State Court which must proceed strictly

according to the law and procedure of the legislature. Deference to such a custom was guaranteed by Congress and the Northern Cheyenne Tribe when they established the Tribe's constitution, bylaws and ordinances providing for exclusive tribal jurisdiction over this matter.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Opinion of the Supreme Court of the State of Montana.

Respectfully submitted.

CLARENCE T. BELUE
201 West 4th Street
Hardin, Montana 59034
Attorney for Petitoner

August 26, 1975

APPENDIX A

The opinion of the Supreme Court of the State of Montana is reported as STATE of Montana ex rel. In the Matter of the ADOPTION OF Ivan FIRECROW, a minor by Leroy Runsabove and Josephine Runsabove, Petitioners, v. The DISTRICT COURT OF the SIXTEENTH JUDICIAL DISTRICT of the State of Montana, IN AND FOR the COUNTY OF ROSEBUD, and the Honorable Alfred B. Coate, Judge Thereof, Respondents, No. 13025. 536 P.2d 190. The full text of this opinion is as follows:

CASTLES, Justice.

This a petition for a writ of supervisory control or other appropriate writ seeking relief from an order of the district court of the sixteenth judicial district, Rosebud County, which held the district court had no jurisdiction in this adoption proceeding and ordered the case dismissed.

On August 20, 1974, petitioners Leroy and Josephine Runsabove filed in the district court a petition for the adoption of Ivan Firecrow, a minor child, born May 10, 1965. Consent to the adoption and waiver of further notice, executed by the natural father, was filed with the petition for adoption. Petitioners, the child, and the natural mother are all enrolled members of the Northern Cheyenne Tribe and have resided on the Northern Cheyenne Reservation at all times pertinent to this matter.

Previously, on July 1, 1969, Ivan Firecrow was made a ward of the Northern Cheyenne Tribal Court upon a finding that the natural mother had neglected the child. An order was entered that day giving petitioners temporary custody of the child. They have had custody of the child since that time. On August 30, 1974, the tribal court ordered the natural mother be granted temporary custody of the child for six weeks during the summer months.

Article III, section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation,

CLARENCE T. DELUE
ATTORNEY AT LAW
401 WEST FOURTH ST.
HARDIN, MT. 59034

reads, in pertinent part:

> "The Tribal Court of the Northern Cheyenne Reservation shall have juristiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> "Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized."

The district court held a hearing upon the petition for adoption on October 11, 1974. Ivan was present at the hearing, having come from Oregon where he attends school under the auspices of the Mormon Church, during the school year. The natural mother objected to the hearing alleging the district court had no jurisdiction to hear and grant the petition for adoption and, that the matter was within the exclusive jurisdiction of the tribal court. Following submission of briefs on the issue of jurisdiction and receipt of an advisory opinion from the appellate court of the Northern Cheyenne Tribe, the district court issued its order holding that it had no jurisdiction over the adoption and ordered the case dismissed.

[1-3] We are presented with a single issue for review: Whether, upon the facts outlined above, the district court has subject matter jurisdiction over the instant petition for adoption? We hold it does have such jurisdiction.

Montana's statutes regarding adoption are in Chapter 2, Title 61, R.C.M. 1947. Section 61-202 reads:

> "Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted."

Section 61-204 reads:

> "Proceedings for adoption must be brought in the district court of the county where the petitioners reside."

The statutes have been complied with. Ivan was within Montana, at home with petitioners during summer vacation when the petition was filed. Petitioners' place of residence is the town of Lame Deer, county of Rosebud, state of Montana. While the residence of

CLARENCE T. DELUE
ATTORNEY AT LAW
401 WEST FOURTH ST.
HARDIN, MT. 59034

petitioners and Ivan is within the exterior boundaries of the Northern Cheyenne Reservation, that residence is also within the state of Montana. Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573.

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. § 461 et seq. It is organized and existing under a constitution and by-laws ratified by the tribe on November 2, 1935, and approved by the Secretary of the Interior on November 23, 1935. Prior to that time the courts of this state had jurisdiction over adoption matters involving Indians. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 31 St.Rep. 22.

The jurisdiction of the courts of the state of Montana is not divested by the subsequent, unilateral action of the Northern Cheyenne Tribe in enacting Article III, section 2, of its Revised Law and Order Ordinances, heretofore quoted. Assuming that the tribal court has jurisdiction over adoptions involving Indians, it is a jurisdiction concurrent with that of the district court. It is not an exclusive jurisdiction. The United States Congress has implicity recognized that state courts have concurrent jurisdiction over adoptions involving Indians in 25 U.S.C. § 372a. The district court having always had jurisdiction over adoptions involving Indians, 25 U.S.C. §1322 is not applicable.

This Court in Bad Horse vs. Bad Horse, 163 Mont. 445, 517 P.2d 893, 895, 31 St. Rep. 22, 25, stated:

> "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of the state of Montana. An Indian is entitled, as any other citizen, to bring an action in the courts of this state. Art. III, Sec. 6, of the 1889 Montana Constitution (Art. II, Sec. 16 of the 1972 Montana Constitution); Section 83-102, R.C.M. 1947; Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317."

Compare McCrea v. Busch, 164 Mont. 442, 524 P.2d 781, 31 St. Rep. 551, where an Indian sued a non-Indian in a state court for damages arising out of an accident on a reservation.

CLARENCE T. BILLE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HAVRE, MT. 59501

[4] Being citizens of the state of Montana, petitioners and Ivan are entitled to the equal protection of the laws. Article II, Section 4, 1972 Montana Constitution. Petitioners are entitled to the use of Montana's court system on a par with other Montana citizens regardless of the fact that they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. Petitioners and Ivan are entitled to the benefit of Montana's adoption statues, as are all Montana citizens, regardless of the fact they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. To hold that the district court does not have subject matter jurisdiction over this controversy would be to deprive petitioners and Ivan of these rights of citizenship. It would make them something less than full citizens.

The order of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

JAMES T. HARRISON, C. J., and JOHN C. HARRISON, HASWELL and DALY, JJ., concur.

CLARENCE T. BILLE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HAVRE, MT. 59501

APPENDIX B

The opinion of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud is unreported, and the full text of the opinion is as follows:

Petitioners are the daughter and son-in-law of the Respondent and have petitioned to adopt one of the Respondent's children. The natural father of the child has consented to the adoption. All of the parties to this proceeding are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of that reservation. Petitioners reside within Rosebud County, State of Montana.

At the hearing on the Petition the Respondent moved to dismiss the petition on the ground that the state court lacked jurisdiction over members of an Indian tribe who were residing within an Indian reservation. There is no question that this court is the proper court to hear the petition, if it has jurisdiction over Indians who are members of and residing within the boundaries of their reservation.

Jurisdiction cannot be conferred upon a court by the consent of the parties. In re Vincent's Estate, 133 Mont. 424, 324 P.2d 403. A decree rendered by a court without jurisdiction is void. In re Woodside-Florence Irr. Dist., 121 Mont. 346, 194 P.2d 241. Therefore it is most important that this court determine its jurisdiction and render a decision in this matter.

Congress, in 1940, recognized that state courts could have jurisdiction to grant Indian adoptions. 25 U.S.C. 372 A. That statute was not repealed by the Indian Civil Rights Act of 1968, 25 U.S.C. section 1320 et seq. Congress has never conferred adoption jurisdiction upon the states by specific legislative enactment; therefore, jurisdiction to grant adoptions over Indian people by a state court must have been conferred by tribal action.

CLARENCE T. BELUE
ATTORNEY AT LAW
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In Kennerly vs. District Court, 300 U.S. 423, 426, 91 S.Ct. 480, 482, 27 Led 2d 507, the United States Supreme Court said:

> The Court in Williams, in the process of discussing the general question of state action impinging on affairs of reservation Indians, noted that "[e] essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S., at 220, 79 S.Ct., at 271.

By this test, this court now holds that the Montana Constitution and the legislative enactments of this state, insofar as the jurisdiction of state courts over adoption proceedings is concerned, does not infringe on the right of reservation Indians to make their own laws.

This court further finds that jurisdiction over Indian adoptions, if there be such, could only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, provides:

> Adoptions.
>
> The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
>
> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts. (Emphasis added).

This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:

> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of

CLARENCE T. BELUE
ATTORNEY AT LAW
[illegible]

the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?

2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?

In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time.

Dated this 25th day of March, 1975.

/s/ Alfred B. Coate
DISTRICT JUDGE

SUPPLEMENATRY ORDER

This court certified a question of Indian law to the Appellate Court of the Northern Cheyenne Tribe of Indians concerning the jurisdiction of this court to grant adoptions to Indians of that tribe residing within the exterior boundaries of that reservation.

That court has issued its Opinion on the question and has held:

> It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of said minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

Therefore, the court now Orders, and this does Order, that:

1. The above entitled court has no jurisdiction in this proceeding; and
2. The petition in this cause be denied and the case be dismissed.

CLARENCE T. BULLUR
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

Dated this 18th day of April, 1975.

/s/ Alfred B. Coate
DISTRICT JUDGE

CLARENCE T. BULLUR
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

APPENDIX C

The Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians is unreported and the full text of the opinion is as follows:

This is an extra-ordinary opinion of the Appellate Court of the Northern Cheyenne Tribe and the same is advisory only since this Court does not have any jurisdiction over the proceedings of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud.

It appears to this Court from the information and facts presented to this Court by Judge Thomas Gardner, Tribal Judge of the Northern Cheyenne Tribal Court, that the Honorable Alfred B. Coate, District Judge of the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Rosebud, filed with said Tribal Judge a copy of an Order of said District Court which was made and entered on the 25th day of March, 1975, by said District Judge and which is entitled, "In the Matter of Adoption of Ivan Firecrow, a minor." (Adoption No. 116 of said District Court)

A copy of said Order is annexed to this Opinion for the purpose of reference to the same.

It appears to this Court that adoption proceedings are pending in said District Court and that all of the parties to the adoption proceedings are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. In said Order, his honor, the presiding Judge of said District Court, sets forth the following:

> "This court further finds that jurisdiction over Indian adoptions, if there be such, could only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, provides:
>
> > Adoptions.
> > The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
> >
> > Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
> >
> > On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Court. (Emphasis added.)
>
> This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:
>
> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?
>
> 2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?
>
> In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time."

Under the amended Constitution and By-laws of the Northern Cheyenne Tribe which was approved by the Assistant Secretary of the Interior on July 8, 1960, by Article V, certain Enumerated Powers were provided for and authorized to be carried out as functions and duties of the Northern Cheyenne Tribal Council. Among the Enumerated Powers by the Sub-section (i) of Section 1 of Article IV, the Tribal Council, subject to any limitations imposed by applicable statutes of the United States, and subject further to all express restrictions upon such powers contained in said amended Constitution, was authorized to promulgate and enforce ordinances, which are subject to review by the Secretary of the Interior. Said Sub-section (i) reads as follows, to-wit:

CLARENCE T. DELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

"(i) To promulgate and enforce ordinances, which shall be subject to reveiw by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

Pursuant to said constitutional Enumerated Powers of the Northern Cheyenne Tribal Council, the Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, Montana was passed and adopted by Tribal Resolution No. 23 (66) and the same was approved by the Commissioner of Indian Affairs on June 9, 1966. Chapter III of said Revised Law and Order Ordinances provides for granting of jurisdiction in the Tribal Court of adoptions among members of the Northern Cheyenne Tribe. Section 2 of said revised ordinances reads as follows, to-wit:

"SECTION 2: Adoptions:

The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.

Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized.

On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written concent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

His Honor, Judge Alfred B. Coate, as set forth in his said Order of the District Court, finds that only persons who are members of the Northern Cheyenne Tribe and who reside within the exterior boundaries of the Northern Cheyenne Indian Reservation are involved in the adoption proceedings pending before the District Court. Therefore, this Opinion will be confined to the

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

status of the parties involved in the subject State Court proceedings.

In other words, non-members of the Northern Cheyenne Tribe or non-Indians or both non-members of the Northern Cheyenne Tribe and members of the Tribe as parties to the adoption proceedings pending in said adoption matter before said District Court, are not involved.

Therefore, the minor, Ivan Firecrow, and all other persons appearing in the State District Court adoption proceedings are members of the Northern Cheyenne Tribe of Indians and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

From the factual situation found to exist by Judge Coate, as set forth in his Order, a copy of which is hereto annexed, it appears that the first two paragraphs of section 2 of Chapter III of the Tribal Code sets forth the Tribal law applicable to adoptions where the adoptive minor and all other parties involved in an adoption proceeding are members of the Northern Cheyenne Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. Therefore, in the matter at bar before the State District Court, it is not necessary for this Appellate Court to interpret or make any opinion as to the provisions of the third paragraph of said section 2 of Chapter III of the Tribal Code.

It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of the minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the

CLARENCE T. BELUE
ATTORNEY AT LAW
201 WEST FOURTH ST.
HARDIN, MT. 59034

Northern Cheyenne Indian Reservation.

This Court has not been called upon to decide any issue involving non-members of the Northern Cheyenne Tribe or non-Indians or both, who wish to adopt a member of the Northern Cheyenne Tribe. Therefore, this Court does not make any opinion or interpretation as to the provisions of the last (3rd) paragraph of said Section 1 of Chapter III of the Tribal Code.

It must be understood that in making this Opinion this Court recognizes the limitations of its jurisdiction. The confines of the jurisdiction of this Court are fixed by section 6 of Chapter I of the Tribal Code, which provides that the Appellate Judge --- "will act as Appellate Judge for the Northern Cheyenne Tribal Court."

Therefore, the Opinion is made by the Appellate Court of the Northern Cheyenne Tribe at the request of the Honorable Alfred B. Coate, District Judge, as foresaid, and this extraordinary Opinion is not to be in any manner construed as an admission as "in rem" or "in personam" jurisdiction by the Courts of the State of Montana in the case at bar which is pending in the Sixteenth Judicial District before the Honorable Alfred B. Coate entitled, "In the Matter of the Adoption of Ivan Firecrow, a minor".

Since this Opinion was requested the Trial Judge of the Northern Cheyenne Tribe it is hereby ordered that a copy of this Opinion be forthwith mailed by United States mail to the Honorable Alfred B. Coate, District Judge at Forsyth, Montana and a duplicate copy be mailed to Judge Thomas Gardner, Tribal Judge.

DATED this 12th day of April, 1975.

Appellate Judge of the Northern Cheyenne Tribe of Indians.

LAWRENCE T. BILLE
ATTORNEY AT LAW